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Supreme Court of the United States,

OCTOBER TERM, 1930.

No. 449.

E. S. SMITH,

Appellant,

vs.

W. B. CAHOON, Sheriff of Duval County, Florida,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

STATEMENT OF APPELLANT AS TO JURISDICTION ON APPEAL, AS REQUIRED BY RULE NO. 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES EFFECTIVE JULY 1, 1928.

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Supreme Court of the United States.

OCTOBER TERM, 1930.

E. S. SMITH, Appellant, vs. W. B. CAHOON, Sheriff of Duval County, Florida, Appellee.	No. 449

STATEMENT OF APPELLANT AS TO JURISDICTION ON APPEAL.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provisions Sustaining the Jurisdiction of This Court.

This appeal is taken under Sections 861 (a) and 861 (b) of Title 28 of the United States Code, as amended April 26, 1928, and under Rule 46 of the Rules of this Court effective July 1, 1928. Under the old practice a writ of error would have been issued under Section 237 of the Judicial Code as amended, by act of February 13, 1925 (c. 222, 43 Stat. 938), being Section 344, Title 28, of the United States Code, and particularly under Section 237 (a) of the Judicial Code as amended, providing in part that

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be

had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

B.

Date of Final Mandate or the Judgment and Date of Application for Appeal.

The final mandate or judgment of the Florida Supreme Court was dated on July 8, 1930 (R. pp. 71-72)* which referred to and made effective the Order of Reversal dated May 21, 1930 (R. p. 64).

The application for appeal therefrom was presented, the order allowing appeal entered and the citation issued and served on August 14, 1930 (R. pp. 73-84).

C.

Nature of Case and Rulings Below.

1. Facts and Rulings of Florida Circuit Court.

The Appellant, a private contract carrier, transporting merchandise for hire by motor vehicle, was arrested on a warrant charging him with operating his truck and trailer without a certificate of public convenience and necessity and without an advance payment of the mileage tax in violation of Chapter 13,700, Laws of Florida, 1929 (R. pp. 2-3). The Appellant concededly is a private carrier employed by the Great Atlantic & Pacific Tea Company under a single contract to haul merchandise from its Jacksonville warehouse to certain of its retail stores situated in several of the towns and cities of Florida (R. pp. 12, 16).

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* Note: All references herein to the Record are to the pages of the certified unprinted Record prepared by the Clerk of the Supreme Court of Florida on file with the Clerk of this Court. The Record has not yet been printed.

After a preliminary hearing before a Justice of the Peace he was committed to the custody of the Sheriff of Duval County, Florida, the Appellee herein, and bound over to the Criminal Court of Record of that County (R. pp. 2, 8, 35-36). Petition for a writ of habeas corpus was addressed to the Circuit Court of Duval County (R. pp. 2-7). On the authority of *Frost* v. *Railroad Commission of California*, 271 U. S. 583, and *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570, the Court ordered the release of the Appellant, holding that he was being illegally detained under an unconstitutional statute, which, according to the plain and natural meaning of its provisions, required a private carrier to assume the duties, burdens and obligations of a common carrier and become subject to the same rules and regulations (R. pp. 37-43). In the words of the Court:

> "It is, therefore, the opinion of the Court that Chapter 13700, Laws of Florida, 1929, violates Sections 1 and 12 of the Declaration of Rights of the Constitution of the State of Florida, and the Fourteenth Amendment of the Constitution of the United States, in so far as the same relates to private carriers for compensation * * *
>
> "A number of other constitutional objections were raised by the Petitioner, but the Court having reached the conclusion above set forth, it is unnecessary to decide the other questions presented" (R. p. 42).

2. The Statute.

Chapter 13,700, Laws of Florida, 1929, provides for the supervision and regulation by the State Railroad Commission and also for the taxation of auto transportation companies engaged in the business of transporting persons or property over the public highways of the State. In Section 1(h) the term "auto transportation company" is defined to mean anyone who owns, controls, operates or manages a motor vehicle "used in the business of transporting persons or property for compensation or as a common carrier over any public highway in this State between fixed termini or over a regular route". The term "motor

vehicle" is defined to mean all motor vehicles "used upon the public highways for the transportation of persons or property for compensation as common carriers". Excluded from both these definitions are, among others, those "engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimps from the point of production to the assembling or shipping point en route to primary market * * *". By Section 2 no auto transportation company is permitted to "operate any motor vehicle for the transportation of persons or property for compensation on any public highway in this State without first having obtained from the Railroad Commission a certificate that the present or future public convenience and necessity requires or will require such operation." By Section 3 the Railroad Commission is empowered after a hearing to "issue a Certificate of Public Convenience and Necessity, as prayed for, or refuse to issue the same, or * * * may issue the same with modification or upon such terms and conditions as in its judgment the public convenience and necessity may require". In applying for a certificate, the applicant is required to file his tariffs and time schedules of operation. By Section 5 the Railroad Commission is "vested with power and authority to supervise and regulate every auto transportation company in the State, to fix or approve the rates, fares, charges, classifications, rules and regulations for each auto transportation company, to regulate the service and safety of operations of each such auto transportation company"; to prescribe uniform systems of accounts, to require filing of annual reports and other data; "and to supervise and regulate auto transportation companies in all other matters affecting the relationship between such companies and the travelling and shipping public". By Section 6 an auto transportation company is required to file tariffs and time schedules with the Commissions; and "to keep open for public inspection at designated offices so much of said schedules of rates and fares and time schedules" as the Commission deems necessary. It is made unlaw-

ful for any transportation company to collect or receive a greater or less rate for services rendered than the charge set forth in the schedules on file with the Commission. By Section 13 a violation of any provision of this Act or a failure to comply with any order of the Railroad Commission is made a misdemeanor punishable by fine, or by imprisonment, or by both. Under Section 14 every transportation company which has been granted a Certificate of Public Convenience and Necessity is required to pay a mileage tax of one cent per mile on each one of its motor vehicles of the capacity of the two motor vehicles operated by the Appellant; and the Comptroller of the State is directed to collect from each holder of a certificate the sum of $75 every three months from and after the issuance of the certificate, as an advance payment upon this mileage tax (R. pp. 16-17). The object of the tax is set forth in Sections 15 and 18. It is to provide funds to pay for the past and future construction of a State system of good roads and its maintenance.

3. Rulings of the Supreme Court of Florida.

On writ of error to the Supreme Court of Florida the order of the Circuit Court was reversed.

The Court refused to consider the effect of the Act in its entirety, ruling, with obvious violence to the manifest legislative intent (128 So. 634), that

> "the statute does not require private carriers to become common carriers and the provisions of the statute that are legally applicable only to common carriers are not intended to be applied to, and are not applicable to, corporations or persons who are not common carriers, though engaged in the transportation to which the statute refers; and the provisions of the statute that are legally applicable to private carriers for compensation are capable of being effectuated, leaving the provisions that are legally applicable only to common carriers to be applied to such common carriers as are covered by the statute. This does not violate the pertinent principles that are announced in *Michigan Public Utilities*

Co. v. *Duke*, 266 U. S. 570, 45 Supreme Court 191, 69 Law Ed. 445, 36 A. L. R. 1105; *Frost* v. *Railroad Commission of California*, 271 U. S. 583, 46 Supreme Court 605, 70 Law Ed. 1101, 47 A. L. R. 457" (R. p. 61).

The Court, however, failed to state with which of the provisions a private carrier should comply so as not to provoke the penalties under Section 13. By such construction, the penal provision becomes so vague and indefinite as to deprive the appellant of his liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The Court took the position that the only portions of the statute involved in the case actually pending before it were those pertaining to certificates of public convenience and necessity and the mileage tax, and in respect to them decided (128 So. 634) that

> "The requirements as to procuring certificates of convenience and necessity for doing the business on the highways and as to the tax imposed on the business may be reasonably applied to private carriers for compensation for the privilege of transporting for hire as a business on the public roads of the State, in the exercise of the police and taxing power of the State to conserve the proper use of the public highways and to serve proper sovereign purposes" (R. p. 61).

With respect to the mileage tax, the Court ruled (128 So. 635) that

> "it is not in law or in fact a 'toll' collected for vehicular passage over the roads, it not being collected for mere passage over the roads or 'exacted when and as the privilege of passage is exercised'. *Carley & Hamilton* v. *Snook* [281 U. S. 66], 50 Sup. Ct. 204, 74 Law Ed. [250] February 24, 1930" (R. p. 61).

The Court further decided (128 So. 635) that

> "Even if the 'mileage tax' as here imposed may be regarded as a 'toll' under the Federal Highway Act, it is not shown that the petitioner operates only upon high-

ways that have been 'constructed or reconstructed' under the Federal Act. The state law is operative upon state highways when not in conflict with applicable dominant federal authority. See *Carley* v. *Snook*, 50 S. Ct. 204, 74 L. Ed. [250]; *Bekins Van Lines* v. *Riley*, 280 U. S. 80, 50 S. Ct. 64, 74 L. Ed. [96]; *Iowa Motor Vehicle Ass'n* v. *Board*, 207 Iowa, 461, 221 N. W. 364; *Williams* v. *Riley*, 280 U. S. 78, 50 S. Ct. 63, 74 L. Ed. [95]" (R. p. 62).

As to the exceptions from the operation of the statute of those auto transportation companies "engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point en route to primary market", the Court ruled without accompanying reasons (128 So. 635) that

> "Such exceptions have a reasonable basis for just distinctions, and do not make the statute operate arbitrarily upon some and not upon others under practically similar conditions." (R. pp. 62-63).

Thus the Federal questions presented by the assignments of error in the appeal now before this Court were presented upon appeal and were passed upon by the Supreme Court of Florida. The decision of the Florida Supreme Court filed May 21, 1930 (R. pp. 64-65), and the judgment entered thereon were in favor of the validity of Chapter 13,700, Laws of Florida, 1929, as so construed and applied by said Court, and denied the claims of the appellant that said statute was repugnant to the Constitution and Laws of the United States.

D.

Cases Sustaining the Jurisdiction.

Frost v. *Railroad Commission of California*, 271 U. S. 583;

Quaker City Cab Company v. *Pennsylvania*, 277 U. S. 389;

International Harvester Company v. *Kentucky*, 234 U. S. 216;
Manley v. *Georgia*, 279 U. S. 1.

In each of the cases cited, this Court has assumed jurisdiction on appeal or on a writ of error to the state court under the former procedure, to determine whether a state statute, as construed and applied by the highest court of the state, is valid under the Constitution and Laws of the United States. These cases are therefore authorities sustaining the jurisdiction of this Court.

That substantial Federal questions are involved see

Michigan Public Utilities Commission v. *Duke*, 266 U. S. 570;
Tyson & Brother v. *Banton*, 273 U. S. 418;
Terminal Taxicab Co. v. *District of Columbia*, 241 U. S. 252;
Connally v. *Union Sewer Pipe Co.*, 184 U. S. 540;
Louisville Gas & Electric Co. v. *Coleman*, 277 U. S. 32;
Carley & Hamilton v. *Snook*, 281 U. S. 66;
Connolly v. *General Construction Company*, 269 U. S. 385.

We respectfully submit that this Court has jurisdiction of this appeal.

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